

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

**LARRY O. WILDER**  
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

**JONI L. GRAYSON**  
Jeffersonville, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

STEPHEN VanWAGNER,

Appellant,

vs.

KAY NIEVES VanWAGNER,

Appellee.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 10A04-0606-CV-342

---

APPEAL FROM THE CLARK CIRCUIT COURT  
The Honorable Nicholas South, Special Judge  
Cause No. 10C01-0405-DR-89

---

**June 21, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Stephen VanWagner (“Husband”) appeals from the Clark Circuit Court’s order which refused to enforce all provisions of a premarital agreement between him and Kay Nieves VanWagner (“Wife”). He raises the following issues, which we restate as:

- I. Whether the trial court erred when it ordered Husband to pay temporary maintenance to Wife;
- II. Whether the trial court erred when it ordered Husband to pay a portion of Wife’s attorney fees; and,
- III. Whether the trial court erred when it awarded possession of certain items of personal property to Wife.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

### **Facts and Procedural History**

Husband and Wife met online in late 1999 while both were amidst divorce proceedings from their respective second spouses. Wife lived in Tennessee and worked as a dental hygienist. Husband, a pilot for UPS, resided in Jeffersonville, Indiana. In June 2000, Wife and her teenage daughter moved to Indiana to live with Husband. On June 26, 2001, Husband and Wife executed a premarital agreement and were married three days later.

Wife filed a petition for dissolution on May 7, 2004. On the same date, based upon Husband’s physical assault of Wife, the trial court issued a protective order against Husband and ordered him to stay away from the marital residence. During the divorce proceedings, Husband sought to enforce the terms of the premarital agreement, while Wife argued that the agreement was unconscionable. The trial court conducted a hearing

on June 8, 2004. On June 22, 2004, the court entered a provisional order providing that Wife should have possession of the marital residence for ninety days and that Husband pay maintenance to Wife in the amount of \$200 per week.

On May 5, 2005, the trial court entered findings and conclusions on the issue of the validity of the premarital agreement, finding that the premarital agreement was enforceable. At the conclusion of a series of hearings, the trial court entered a dissolution decree on June 7, 2006, but refused to enforce provisions of the premarital agreement regarding maintenance and attorney fees as in violation of public policy. Husband now appeals. Additional facts will be provided as necessary.

### **Standard of Review**

Because the trial court entered findings and conclusions, we apply a two-tiered standard of review: first, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Dedek v. Dedek, 851 N.E.2d 1048, 1050 (Ind. Ct. App. 2006). We disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. Id. The challenger must establish that the trial court's findings are clearly erroneous. Id. Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. Id. However, we do not defer to conclusions of law, and a judgment is clearly erroneous if it relies on an incorrect legal standard. Id.

### **Discussion and Decision**

Antenuptial agreements are legal contracts entered into prior to marriage which attempt to settle the interest each spouse has in property of the other, both during the

marriage and upon its termination. Rider v. Rider, 669 N.E.2d 160, 162 (Ind. 1996). Indiana courts will uphold antenuptial agreements as valid contracts so long as they are entered into freely and without fraud, duress, or misrepresentation, and are not unconscionable. Id. (citing Mallow v. Eastes, 179 Ind. 267, 100 N.E. 836 (1913); Kennedy v. Kennedy, 150 Ind. 636, 50 N.E. 756 (1898); McNutt, v. McNutt, 116 Ind. 545, 19 N.E. 115 (1888)).

Agreements fixing the property rights of each party upon dissolution of the marriage and which are freely entered and are not unconscionable must be honored and enforced by the courts as written. In re Marriage of Boren, 475 N.E.2d 690, 694 (Ind. 1985). “A court should not substitute its judgment for that of the parties and re-write the contract.” Id.

## **I. Maintenance**

In the premarital agreement, the parties agreed to “waive any claim against the other for attorney fees, maintenance, support or other property except as specifically stated herein.” Appellant’s App. p. 70. Husband argues that the trial court erred when it refused to enforce this provision and ordered him to pay maintenance to Wife during the provisional period.<sup>1</sup>

---

<sup>1</sup> The premarital agreement also provided:

During any provisional period of the Dissolution, [Husband] shall retain the marital residence and shall have no obligation to provide support or maintenance to [Wife] except as follows:

a. If she voluntarily leaves the marital residence, she shall receive \$3,000.00 initially and \$1,000 per month for the next six months. For the purpose of determining voluntarily, it shall be presumed that she voluntarily left if she leaves within 24 hours of written notice by [Husband] without the necessity of application to the Court for her removal. If she does not voluntarily, she shall waive the \$1,000 per day [sic] of the proposed total \$9,000.00 she would receive during the six-month period. Appellant’s App. pp. 15-16.

Indiana has adopted a version of the Uniform Premarital Agreement Act (“UPAA”), the relevant provision of which provides:

If: (1) a provision of a premarital agreement modifies or eliminates spousal maintenance; and (2) the modification or elimination causes one (1) party to the agreement extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement; a court, notwithstanding the terms of the agreement, may require the other party to provide spousal maintenance to the extent necessary to avoid extreme hardship.

Ind. Code § 31-11-3-8(b) (1998). Here, the trial court found

where, as here, there exists a wide disparity of income, or the economic power of the parties is clearly unequal or because one of the [p]arties would be left in a situation where they did not have sufficient income to support themselves or to obtain adequate legal representation, then provisions in an antenuptial agreement that restrict the Court’s ability to provide spousal maintenance or to award attorney fees in the appropriate circumstances should be found to be void as against public policy.

Appellant’s App. p. 9.

Relying upon Rider v. Rider, 669 N.E.2d 160 (Ind. 1996), Husband argues that the trial court erred by refusing to enforce the no-maintenance provision of the premarital agreement because it was not unconscionable and Wife does not “face the prospect of being forced upon public assistance by the enforcement of the [a]greement[.]” Br. of Appellant at 17. However, as Rider specifically points out, that case involved a premarital agreement executed *before* Indiana’s adoption of the UPAA in 1995. Under Indiana Code section 31-11-3-8(b), a trial court may order maintenance to avoid “extreme hardship under circumstances not reasonably foreseeable at the time of the

---

Husband does not contest the trial court’s order that he pay Wife \$6000 pursuant to this provision of the agreement. See Appellant’s App. pp. 10, 16.

execution of the agreement[.]” notwithstanding the terms of a premarital agreement. Therefore, Husband’s argument about unconscionability is unavailing.

The trial court was presented with evidence indicating that Husband earned an annual income in excess of \$200,000. Tr. p. 16. Wife testified that she “was never allowed to work after [they] married.” Tr. p. 18. Wife also testified that, after filing for dissolution, she had found part-time work as a dental hygienist earning \$25 per hour. Tr. p. 79. She also testified that, due to the injury she sustained when Husband assaulted her, she did not find work immediately because she “had to wait for [her] arm to heal....to where [she] could fully use her arm.” Tr. p. 265.

This evidence supports the determination that enforcement of the no-maintenance provision would present an extreme hardship to Wife. Therefore, pursuant to Indiana Code section 31-11-3-8(b), the trial court’s order that Husband pay Wife provisional maintenance is not clearly erroneous.

## **II. Attorney Fees**

Next, Husband argues that the trial court erroneously ordered him to pay a portion of Wife’s attorney fees, contrary to the terms of the premarital agreement. Under Indiana Code section 31-11-3-5, parties to a premarital agreement may contract with each other regarding a number of listed concerns as well as “[a]ny other matter not in violation of public policy[.]” Ind. Code § 31-11-3-5(a)(8) (1998). As a general rule, a contract for attorney fees is enforceable according to its terms unless contrary to law or public policy. Pond v. Pond, 700 N.E.2d 1130, 1136 (Ind. 1998).

Wife points out that our supreme court has recognized that the award of attorney fees in a dissolution proceeding is in keeping with the public policy of “insur[ing] equal access to the courts despite the relative financial conditions of the parties.” Beeson v. Christian, 594 N.E.2d 441, 443 (Ind. 1992).

However, it is well established that the public policy of this state generally favors the freedom of contract between private parties. Pond, 700 N.E.2d at 1136. “There is a ‘very strong presumption of enforceability of contracts that represent freely bargained agreement of the parties.’” Id. (quoting Continental Basketball Ass’n, Inc. v. Ellenstein Enter., Inc., 669 N.E.2d 134, 139 (Ind. 1996)).

In the premarital agreement, the parties agreed to waive “any claim against the other for attorney fees[.]” Appellant’s App. p. 70. As this court has observed, “the law generally permits persons of full age and competent understanding the utmost liberty to contract, and their contracts, when entered into freely and voluntarily, are enforced by the courts.” Pardieck v. Pardieck, 676 N.E.2d 359, 365 (Ind. Ct. App. 1997), trans. denied.

Therefore, we must conclude that the trial court’s award of attorney fees to Wife in contravention of the premarital agreement is clearly erroneous.

### **III. Property Division**

Husband argues that the trial court erred when it awarded possession of various items of personal property, including a 1987 Volkswagen Jetta, to Wife. The premarital agreement provided that upon dissolution of the marriage:

The parties shall each retain their separate property. All property of the marriage shall be determined to be “separate” unless specifically titled, or held, in the parties’ joint names. It shall be presumed, that unless [Wife] brought the tangible personal property into the marriage, and it is listed on

Exhibit B, that all tangible personal property, not otherwise held by title or in a party's individual name, will be [Husband's] unless [Wife] can show she purchased said property through her own personal account.

Appellant's App. p. 15.

The trial court found:

[Wife] is entitled to those items of personal property owned by her prior to the marriage as set forth in exhibit "B" to the antenuptial agreement including the 1987 Volkswagen Jetta Automobile.

Appellant's App. p. 9. Husband admitted that title to the car was transferred to him before the marriage. See tr. p. 393. Thus, his argument that Wife gave him the car during the marriage is unpersuasive. The Jetta is included as Wife's property in Exhibit B of the premarital agreement. Appellant's App. p. 20. Therefore, the trial court's award of the '87 Jetta to Wife is not clearly erroneous.

Finally, Husband challenges the following finding:

With respect to other personal property acquired during the marriage, the evidence is that [Wife] although she did not contribute to the purchase thereof, she was prevented from gainful employment by [Husband]. As such, he may not now complain that she failed to contribute to the acquisition of such assets. The Court finds that [Wife] should have such personal property in her possession, unless such item is specifically set over to [Husband] herein.

Appellant's App. pp. 9-10.

The trial court endured extensive testimony regarding the division of the couple's personal property. See tr. pp. 296-417. When questioned by Husband's counsel about how various items of property (including sundry household items such as Christmas dishes, a yellow candle, napkins, a tape dispenser, a pencil sharpener, and a box of lightbulbs) were acquired, Wife admitted that she did not pay for items she removed from



the house. Id. She explained that, “I wasn’t allowed to work. I did pay for it...without, you know, money.” Tr. p. 339.

Be that as it may, the premarital agreement specifically provided that all tangible personal property is presumed to “be [Husband’s] unless [Wife] can show she purchased said property through her own personal account.” Appellant’s App. p. 15. Therefore, we must conclude that awarding Wife the personal property she removed from the marital residence is clearly erroneous.<sup>2</sup>

### **Conclusion**

The trial court did not err when it awarded temporary maintenance to Wife. The award of attorney fees and personal property to Wife contrary to the terms of the premarital agreement was clearly erroneous. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

NAJAM, J., and MAY, J., concur.

---

<sup>2</sup> Wife also admitted during the proceedings that she had the opportunity to consult with her attorney before signing the premarital agreement. Tr. pp. 35-37. He told her that the agreement “was extremely one-sided” and urged her not to sign it. Tr. p. 50. Under Indiana law, this court is charged with enforcing that agreement according to its terms.